

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

SKYMARK FINANCE CORPORATION

Applicant

- and -

**MAHAL VENTURE CAPITAL INC. and GOLDEN MILES FOOD
CORPORATION**

Respondents

**FACTUM OF THE RECEIVER
(Distribution and Fee & Activity Approval)**

Returnable August 23, 2023

August 21, 2023

BLAKE, CASSELS & GRAYDON LLP

Barristers and Solicitors

199 Bay Street

Suite 4000, Commerce Court West

Toronto, Ontario M5L 1A9

Chris Burr, LSO #55172H

Tel: 416-863-3261

Email: chris.burr@blakes.com

Daniel Loberto, LSO #79632Q

Tel: 416-863-2937

Email: daniel.loberto@blakes.com

Lawyers for the Receiver and Trustee

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

SKYMARK FINANCE CORPORATION

Applicant

- and -

**MAHAL VENTURE CAPITAL INC. and GOLDEN MILES FOOD
CORPORATION**

Respondents

PART I - OVERVIEW

1. This Factum is filed by KSV Restructuring Inc., (“**KSV**”) in its capacities as Court-appointed receiver and manager (in such capacity, the “**Receiver**”) of Mahal Venture Capital Inc. (“**Mahal VC**”) and Golden Miles Food Corporation (“**Golden Miles**” and, together with Mahal VC, the “**Companies**”), and as licenced insolvency trustee of the Companies (the “**Trustee**”).

2. This Factum is filed in support of the Receiver’s motion (the “**Motion**”) seeking an order, (i) authorizing and directing the Receiver to make certain distributions to Vicano Construction Limited (“**Vicano**”), Skymark Finance Corporation (“**Skymark**”), KLN Holdings Inc. (“**KLN**”) and Santokh Mahal (“**Mr. Mahal**”), and maintain certain holdbacks, as further discussed herein, (ii) approving the fees and disbursements of the Receiver and its counsel, Blake, Cassels & Graydon LLP (“**Blakes**”) for the period March 1, 2022 through July 31, 2023, (iii) approving the interim statement of receipts and disbursements for the period ending July 31, 2023 (the “**R&D**”) and (iv) approving the Receiver’s Fourth Report to Court dated November 1, 2022 (the “**Fourth Report**”), the Receiver’s supplement to the Fourth Report dated December 8, 2022 (the “**Fourth**”).

Report Supplement”) and the Receiver’s Fifth Report to Court dated August 15, 2023 (the “**Fifth Report**”, together with the Fourth Report and the Fourth Report Supplement, the “**Reports**”) and the Receiver’s activities described therein.

3. In the Receiver’s view, the proposed interim distributions from the Golden Miles Proceeds (as defined herein) and the Mahal VC Proceeds (as defined herein) are fair and reasonable in the circumstances. Such proposed interim distributions do not give rise to any secured creditor prejudice, nor does the context provide for any unique factor militating against the Court granting the interim distributions. The Receiver’s detailed priority and quantum analysis, completed with expert assistance, is grounded in authoritative jurisprudence, and provides for an equitable result. Similarly, jurisprudence militates in favour of this Court approving the fees of the Receiver and Blakes, the activities contemplated in the Fifth Report, and the R&D.

4. The Receiver accordingly recommends that the Court grant the relief sought.

PART II - FACTS

A. BACKGROUND ON THESE PROCEEDINGS

5. KSV was appointed Receiver of the Companies pursuant to an order of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) made on October 1, 2021 (the “**Receivership Order**”).¹ The resulting receivership proceedings are referred to herein as the “**Receivership Proceedings**”.

¹ Fifth Report of the Receiver and Second Report of the Trustee, dated August 15, 2023 (“**Fifth Report**”) at para 1.0(2).

6. On November 15, 2021, the Receiver filed an assignment in bankruptcy pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended on behalf of the Companies pursuant to Paragraph 3(r) of the Receivership Order. KSV was appointed the Trustee of the Companies.²

7. On April 11, 2022, the Court granted an order in the Receivership Proceedings (the “**Sale Approval Order**”) approving the sale of a non-operational flour mill (the “**Flour Mill**”) built by Golden Miles on real property owned by Mahal VC at 155 Adams Blvd., Brantford, Ontario (the “**Real Property**”) and together with the Flour Mill, the “**Property**”), to 12175622 Canada Inc. (the “**Purchaser**”), pursuant to an agreement of purchase and sale dated March 18, 2022, as amended (the “**APA**”).³

8. The sale transaction contemplated by the APA (the “**Transaction**”) closed on May 18, 2022. The aggregate net proceeds received were \$18.47 million (the “**Sale Proceeds**”), of which \$16 million was allocated to the real property owned by Mahal VC (the “**Real Property Proceeds**”), and \$2.47 million was allocated to the personal property (the “**Personal Property**”) owned by Golden Miles (the “**Golden Miles Proceeds**”).⁴

B. SECURED CREDITORS AND PRIORITY

Secured Creditors as against the Golden Miles Proceeds

² Fifth Report at para 1.0(3).

³ Fifth Report at para 1.0(5).

⁴ Fifth Report at para 1.0(7).

9. The Receiver is currently holding approximately \$1.7 million of the Golden Miles Proceeds.⁵ There are two secured creditors currently with claims against the Golden Miles Proceeds: Mr. Mahal and Skymark.⁶

10. Pursuant to the Endorsement of Justice McEwen, dated May 10, 2023 (the “**May 10 Endorsement**”), Mr. Mahal’s secured claim against the Golden Miles Proceeds was determined to be \$281,600, plus interest at a rate of 5% per year until paid.⁷ The Court further held that the Receiver is entitled to \$75,000 in costs, and Skymark is entitled to \$20,000 in costs.⁸ A subsequent endorsement of Justice McEwen, dated June 30, 2023 confirmed that the May 10 Endorsement did not provide for any costs in favour of Mr. Mahal.⁹

11. As of the date of the Receivership Order, the Companies were indebted to Skymark in the amount of approximately \$29.2 million.¹⁰ The Skymark debt relates to various loans to Mahal VC in connection with mortgages granted by Mahal VC on the Real Property and to Golden Miles in connection with financing for specific equipment.¹¹

12. The Receiver engaged Corporate Assets Inc. (“**Corporate Assets**”), a liquidator and appraiser, to assist with ascertaining the quantum of Skymark’s claim that is secured against the Personal Property financed by, or pledged to, Skymark.¹² Corporate Assets is familiar with the

⁵ Fifth Report at para 4.0(1).

⁶ The Receiver notes that on March 6, 2023, Alvarez & Marsal Canada Inc. was appointed as receiver over Skymark (and Merk, as defined herein) pursuant to an order of Mr. Justice Penny, sought by Skymark’s secured creditor Bridging Finance Inc. (acting by its court-appointed receiver, PricewaterhouseCoopers Inc.).

⁷ Fifth Report at para 5.0(4).

⁸ Fifth Report at para 5.0(5).

⁹ Fifth Report at para 5.0(5).

¹⁰ Fifth Report at para 3.1(1).

¹¹ Fifth Report at para 3.1(1).

¹² Fifth Report at para 5.0(10).

Golden Miles property on account of having participated in the sale process conducted by the Receiver, during which it inspected the equipment at the Flour Mill. Corporate Assets was subsequently provided with copies of the equipment invoices either financed by Skymark or specifically pledged to Skymark by Golden Miles in connection with Skymark advances.¹³

13. Based on this analysis, Corporate Assets advised the Receiver that it believes that the Golden Miles property pledged to Skymark had a market value of approximately 10% of the aggregate Personal Property, which in turn can be applied to the Receiver's analysis of interim distributions from the Golden Miles Proceeds.¹⁴

Secured Creditors as against the Mahal VC Proceeds

14. The Receiver is currently holding approximately \$14.7 million in Real Property Proceeds and other recoveries associated with Mahal VC (together with the Real Property Proceeds, the "**Mahal VC Proceeds**").¹⁵

15. Eleven parties had registrations against the Real Property immediately prior to closing the Transaction.¹⁶ These registrations attach to the Mahal VC Proceeds pursuant to the Sale Approval Order.¹⁷

16. There were four charges registered against the Real Property, three of which were subject to transfers and/or postponements since their registration, and one construction lien.¹⁸ These four

¹³ Fifth Report at para 5.0(11).

¹⁴ Fifth Report at para 5.0(12).

¹⁵ Fifth Report at para 10.0(1).

¹⁶ Fifth Report at para 6.0(1).

¹⁷ Fifth Report at para 6.0(1).

¹⁸ Fifth Report at para 6.1(1).

charges and the construction lien, listed by order of original registration date (though not by order of priority), together with the subsequent transfers and postponements, are as follows:

- (a) \$4,000,000 charge in favour of Merk Investments Ltd. (“**Merk**”) registered on June 22, 2015 (the “**Merk Charge**”), which has been postponed to the 2017 Skymark Charge and the 2018 Skymark Charge (both as defined below);
- (b) \$9,600,000 charge in favour of Skymark registered on August 9, 2017 (the “**2017 Skymark Charge**”), \$2.1 million of which has been transferred to KLN;
- (c) \$6,400,000 charge in favour of Skymark (82.27%) and KLN (17.73%) registered on September 7, 2018 (the “**2018 Skymark Charge**”), portions of which have been transferred to 8 other registered interest holders (including KLN);
- (d) \$4,640,578 and \$439,4201 construction liens in favour of Vicano perfected by a certificate of action, registered on May 16, 2019 (the “**Vicano Lien**”), and which arises pursuant to a construction management contract dated May 18, 2016 between Vicano and Golden Miles Bread & Bagel Corporation (a predecessor company of Golden Miles) (the “**Construction Contract**”); and
- (e) \$35,000,000 charge in favour of Golden Miles registered on March 26, 2021 (the “**Golden Miles Charge**”, and together with the Merk Charge, 2017 Skymark Charge, and 2018 Skymark Charge, the “**Charges**”).¹⁹

¹⁹ Fifth Report at para 6.1(1).

17. The Receiver has determined that the Vicano Lien and the Charges secure the following amounts of indebtedness owing by Mahal VC, in the following priority:

Priority	Charge/Claim	Beneficiary	Total Amount Secured as of August 23, 2023
First	Vicano Construction Lien, to the extent of the unpaid holdback	Vicano	\$1,659,413.00
Second	2017 Skymark Charge	Skymark	\$16,577,003.94
		KLN	\$4,637,487.92
Third	2018 Skymark Charge	Skymark	\$2,035,713.05
		KLN	\$442,644.84
		Thompson	\$177,133.47
		262 Co.	\$88,377.89
		258 Co.	\$177,133.47
		Janodee	\$147,674.17
		C. Renaud	\$91,777.04
		106 Co.	\$442,644.84
		Seagrave	\$177,133.47
Fourth	Merk Charge	Merk	\$1,758,327.65
Fifth	Golden Miles Charge	Golden Miles	Undetermined

18. In developing the above priority analysis, the Receiver and Blakes have (i) reviewed supporting documentation for the security interests asserted against the Golden Miles Proceeds and Mahal VC Proceeds, and (ii) discussed the results of their review with counsel representing the secured creditors. A draft of the Fifth Report, containing the Receiver's priority analysis, was

circulated to affected stakeholders in draft in March, 2023 for consultation purposes, and no comments were received.²⁰

19. Blakes has provided the Receiver with (i) a personal property security review opinion, which is attached to the Fourth Report as Appendix “A”, and (ii) an omnibus security opinion, with the scope of such security opinion limited to the validity of the security of Skymark and KLN, given that these are the only mortgagees to whom distributions are contemplated.²¹ Subject to conventional assumptions and qualifications, Blakes has concluded that the security interests of the applicable parties are valid and enforceable.

C. FEES, ACTIVITIES, AND R&D

20. The activities of the Receiver, since the date of the Third Report of the Receiver dated April 4, 2022, are described in part 13 of the Fifth Report, and are subject to a request for approval by this Court.²² The Receiver is also seeking approval of (i) its fees and disbursements, and the fees and disbursements of Blakes, for the period of March 1, 2022 to July 31, 2023, which fees and disbursements are described in part 14.0 of the Fifth Report, and the fee affidavits attached thereto, and (ii) the R&D, which is further described in part 4.0 of the Fifth Report.²³

PART III - ISSUES

21. This Factum addresses the following issues:

²⁰ Fifth Report at para 2.0(2).

²¹ Fifth Report at para 5.0(1) and 6.0(2).

²² Fifth Report at para 13.0(1).

²³ Fifth Report at para 4.0 and 14.0(1).

- (a) Should this Court authorize the Receiver to make an interim distribution to Skymark and Mr. Mahal from the Golden Miles Proceeds?
- (b) Should this Court authorize the Receiver to make an interim distribution to Vicano, Skymark, and KLN from the Mahal VC Proceeds in connection with the Vicano Lien and 2017 Skymark Charge, and maintain certain holdbacks contemplated herein?
- (c) Should this Court approve the fees of the Receiver and its counsel, the activities of the Receiver, and the R&D?

22. For the reasons that follow, the Receiver submits that each of the above questions should be answered by this Court in the affirmative.

PART IV - THE LAW AND DISCUSSION

A. INTERIM DISTRIBUTION OF THE GOLDEN MILES PROCEEDS

23. Orders authorizing a receiver to make an interim distribution to stakeholders are commonly granted in insolvency proceedings.²⁴ The Court's discretion to make such an Order is squarely within its jurisdiction to do what "justice dictates" and "practicality demands" pursuant to Section 243(1)(c) of *Bankruptcy and Insolvency Act*.²⁵

²⁴ See [Re Abitibiwater Inc., 2009 QCCS 6461, at para. 75](#); the [Ancillary Relief Order of Justice Steele, dated July 19, 2022](#), in the Receivership Proceeding of 2244039 Ontario Inc. and 1526400 Ontario Inc; the [Approval and Vesting Order of Justice Cavanagh, dated December 20, 2022](#) in the Receivership Proceeding of Brant Instore Corporation; and [the Interim Distribution Order of Justice Penny, dated March 3, 2022](#) in the Receivership Proceeding of 33 Yorkville residences and 33 Yorkville Residences Limited Partnership.

²⁵ [Bankruptcy and Insolvency Act R.S.C., 1985](#), c. B-3, s. 243(1)(c); [Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.](#), 2019 ONCA 508 at para 57.

24. The Alberta Court of the King's Bench has stated that a Court must consider "the advantages, disadvantages and potential prejudice of...an interim distribution to all the stakeholders of the debtor entity".²⁶ The Quebec Superior Court in *AbitibiBowater, (Re)* further considered the validity and enforceability of the relevant security, interest savings, and liquidity of the debtor (after making the distribution) in exercising its discretion to grant an interim distribution. While such *AbitibiBowater, (Re)* factors were analyzed in the context of a *Companies' Creditors Arrangement Act* proceeding, they can be similarly applied to these Receivership Proceedings.

25. The factors contemplated in *AbitibiBowater, (Re)* are satisfied in the instant case. The Receiver has reviewed Skymark's secured claim, and has confirmed that it is a valid, enforceable and properly perfected first-in-priority security interest against the personal property to which it attaches.²⁷ The Receiver has consulted Corporate Assets to assist in determining the quantum of the proposed interim distribution to Skymark.²⁸ The Receiver has determined that Skymark has a secured claim over 10% of the Golden Miles Proceeds, based on Corporate Assets' conclusion that Skymark financed 10% of the aggregate Personal Property that was sold in the Transaction.²⁹

26. With respect to Mr. Mahal's claim, the May 10 Endorsement confirms that Mr. Mahal has a secured claim against the Golden Miles Proceeds limited to the amount of \$281,600, plus interest, which brings Mr. Mahal's entitlement to the Golden Miles Proceeds to \$314,755.³⁰ The Receiver recommends that this Court authorize the Receiver to set-off against this entitlement its \$75,000

²⁶ [Re SemCanada Crude Company \(Companies' Creditors Arrangement Act\), 2009 ABQB 90, para. 27.](#)

²⁷ Fifth Report at para 3.1.1(1) and 5.0(9).

²⁸ Fifth Report at para 5.0(10)-(12).

²⁹ Fifth Report at para 5.0(12).

³⁰ Fifth Report at para 5.0(4).

cost award, and Skymark's \$20,000 cost award, bringing the recommended distribution to Mr. Mahal to \$219,755.³¹ This set-off is the most efficient method of addressing the proposed interim distribution to Mr. Mahal in the context of Mr. Mahal's outstanding cost awards.

27. The Receiver therefore respectfully requests that this Court authorize and approve the following proposed interim distribution from the Golden Miles Proceeds to Skymark and Mr. Mahal:

Creditor	Amount of Final Distribution
Skymark	\$247,000, being 10% of the net Golden Miles Proceeds
Mr. Mahal	\$219,755, being Mr. Mahal's priority claim of \$281,600, plus interest, less the aggregate \$95,000 cost award that is being offset
Skymark	\$20,000, being the cost award in the Mahal Security Motion ³²

28. The Receiver would continue to hold approximately \$1.25 million of Golden Miles Proceeds (the "**Residual Golden Miles Proceeds**") after the completion of the above proposed interim distributions.³³ These Residual Golden Miles Proceeds are subject to the Receiver's charge granted by the Order of Mr. Justice McEwen dated October 1, 2021, securing the fees and disbursements of the Receiver and its counsel, but are otherwise unencumbered.³⁴ Any portion of the Residual Golden Miles Proceeds that are not necessary to fund the administration of the Golden Miles receivership shall be distributed by the Trustee, net of the Trustee's costs, on account of the

³¹ Fifth Report at para 5.0(7).

³² Fifth Report at para 5.1(1).

³³ Fifth Report at para 5.0(13).

³⁴ Fifth Report at para 5.0(13).

proven claims of Golden Miles' unsecured creditors, to be assessed in the bankruptcy proceedings.³⁵

B. INTERIM DISTRIBUTION AND HOLDBACK OF MAHAL VC PROCEEDS

Priority Vis-à-vis Registered Charges

29. It is well-established that priority among real property charges is governed by order of registration against title, subject to private arrangements to subordinate one interest to another.³⁶

30. Such private arrangements have occurred in this case. On August 9, 2017, the Merk Charge was subordinated to the 2017 Skymark Charge pursuant to a postponement registered on the same date, as Instrument Number BC322175 (the "**First Postponement**").³⁷ On September 13, 2018, the Merk Charge was subordinated to the 2018 Skymark Charge pursuant to a postponement registered on the same date, as Instrument Number BC345096 (the "**Second Postponement**").³⁸

31. Based on the order of the registered Charges and the associated effect of the First Postponement and Second Postponement, the priority of the Charges is (1) the 2017 Skymark Charge, (2) the 2018 Skymark Charge, (3) the Merk Charge, and (4) the Golden Miles Charge.³⁹

Priority Among Charges and Vicano Lien

32. Part IV of the *Construction Act* requires that any payor under a contract or subcontract under which a lien may arise must retain a holdback of 10% of the price of services or materials

³⁵ Fifth Report at para 5.0(14).

³⁶ [*Land Titles Act, R.S.O. 1990, c. L.5, s. 78\(5\)*](#).

³⁷ Fifth Report at para 6.2(5).

³⁸ Fifth Report at para 6.2(6).

³⁹ Fifth Report at para 6.3(1).

actually supplied under the contract or subcontract until all liens that may be claimed have expired, been satisfied, discharged or otherwise provided for under the *Construction Act*.⁴⁰

33. The holdback provided for under the *Construction Act* applies to the Vicano Lien, with such holdback being in the aggregate amount of \$1,659,413.⁴¹ The Receiver determined this amount pursuant to its consultation with Altus Group Limited (“**Altus**”), which reviewed all available Vicano claims and invoices, and issued the Project Report, dated June 29, 2023, and Class D Estimate, dated July 21, 2023, in respect of the same.⁴²

34. Based on Altus’ analysis and reporting, the Receiver has determined that Vicano’s aggregate invoiced amount of \$17,306,372 should be reduced by \$620,405 and \$90,554 based on recommended deductions, bringing the Vicano total accepted invoice amount to \$16,595,413 and resulting in the 10% unpaid holdback amount of \$1,659,413.⁴³

35. Pursuant to the terms of the *Construction Act*, this \$1,659,413 has priority to the 2017 Skymark Charge, the 2018 Skymark Charge and the Golden Miles Charge. As described below, the Receiver has also concluded that the \$1,659,413 has priority to the Merk Charge.

36. Section 78(3) of the *Construction Act* provides for the following:

78(3) Prior mortgages, prior advances – Subject to subsection (2), and without limiting the effect of subsection (4), all conveyances, mortgages or other agreements affecting the owner’s interest in the premises that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent of the lesser of,

⁴⁰ [Construction Act, R.S.O. 1990, c. C.30, para. 22](#) [*Construction Act*].

⁴¹ Fifth Report at para 6.4.2(10).

⁴² Fifth Report at para 6.4.2(3).

⁴³ Fifth Report at para 6.4.2(10).

(a) the actual value of the premises at the time when the first lien arose; and

(b) the total amounts that prior to that time were,

(i) advanced in the case of a mortgage, and

(ii) advanced or secured in the case of a conveyance or other agreement.⁴⁴

37. The Ontario Court of Appeal has confirmed that mortgage advances which are not taken “with the intention of securing the financing of an improvement” have priority over subsequent liens in connection with section 78(3) of the *Construction Act*.⁴⁵

38. Section 78(2) of the *Construction Act* is an explicit qualification on the priority of prior mortgages relating to mortgages given to secure the construction of improvements on real property, and provides:

78(2) Building Mortgage - Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvements have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered.⁴⁶

39. The Court has reiterated that section 78(2) of the *Construction Act* does not apply to mortgage funds advanced for the purpose of acquiring land.⁴⁷

40. The Merk Charge was registered, and the relevant advance thereunder was made, prior to the date on which the Vicano Lien arose (the Construction Contract was not entered into until almost 13 months later, being May 18, 2016).⁴⁸ Section 78(3) of the *Construction Act* therefore

⁴⁴ [Construction Act, para. 78\(3\)](#).

⁴⁵ [Ontario Wealth Management Corp. v. Sica Masonry, 2014 ONCA 500, para. 23](#).

⁴⁶ [Construction Act, para. 78\(2\)](#).

⁴⁷ [Royal Bank v. Lawton Developments Inc., 1994 CanLII 7215 \(ON SC\), para 14](#), as varied by [Royal Bank of Canada v. Lawton Developments Inc., 1996 CanLII 10246 \(ON CA\)](#).

⁴⁸ Fifth Report at para 6.4.4(6).

applies to the Merk Charge. Section 78(2) of the *Construction Act* is inapplicable to the Merk Charge because this charge was only made to acquire the Real Property and was not used to finance an improvement thereto. The Vicano Lien therefore is subordinate in priority to the Merk Charge pursuant to the *Construction Act* (however the Receiver has concluded that the Merk Charge is ultimately subordinate to the Vicano Lien, for the reasons set out below beginning at Paragraph 45).

41. Advances pursuant to the 2017 Skymark Charge and 2018 Skymark Charge were made to finance the construction of the Flour Mill, or to fund legal or brokerage fees on account of those advances, subject to one exception.⁴⁹ This conclusion results in Section 78(2) of the *Construction Act* being applicable to each of the 2017 Skymark Charge and 2018 Skymark Charge. The 2017 Skymark Charge and 2018 Skymark Charge are therefore subordinate in priority to the Vicano Lien.

42. Section 78(5) and (6) of the of the *Construction Act* provide as follows, respectively:

78(5) Special Priority against subsequent mortgages - Where a mortgage affecting the owner's interest in the premises is registered after the time when the first lien arose in respect of an improvement, the liens arising from the improvement have priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV.

78(6) General priority against subsequent mortgages – Subject to subsections (2) and (5), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that is registered after the time when the first lien arose in respect to the improvement, has priority over the liens arising from the improvement to the extent of any advance made in respect of that conveyance, mortgage or other agreement, unless,

⁴⁹ The one exception to this conclusion is a \$250,000 payment made directly by Skymark to Colliers Macaulay Nicolls Inc. (the "**Colliers Payment**") on May 1, 2018, discussed in Part 6.4.6 of the Fifth Report; the Receiver has concluded for the reasons set out therein that the Colliers Payment is not relevant to the proposed distribution sought in the Receiver's Motion.

(a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or

(b) prior to the time when the advance was made, the person making the advance had received written notice of a lien.⁵⁰

43. The Vicano Lien was preserved on March 7, 2019 by registration of notices of lien, and perfected by registration of a certificate of action on May 16, 2019, with both key dates arising prior to the date which the Golden Miles Charge was registered (being March 26, 2021).⁵¹ The Golden Miles Charge is therefore subordinate in priority to the Vicano Lien.

44. The Receiver has therefore concluded that the priority waterfall for the Mahal VC Proceeds is as set out in Paragraph 17, above, based on its review of the applicable documents, registrations, and the *Construction Act*:

Priority	Charge/Claim	Beneficiary	Total Amount Secured as of August 23, 2023
First	Vicano Construction Lien, to the extent of the unpaid holdback	Vicano	\$1,659,413.00
Second	2017 Skymark Charge	Skymark	\$16,577,003.94
		KLN	\$4,637,487.92
Third	2018 Skymark Charge	Skymark	\$2,035,713.05
		KLN	\$442,644.84
		Thompson	\$177,133.47
		262 Co.	\$88,377.89

⁵⁰ [Construction Act, s. 78\(5\) and \(6\)](#).

⁵¹ Fifth Report at para 6.4.7(3).

		258 Co.	\$177,133.47
		Janodee	\$147,674.17
		C. Renaud	\$91,777.04
		106 Co.	\$442,644.84
		Seagrave	\$177,133.47
Fourth	Merk Charge	Merk	\$1,758,327.65
Fifth	Golden Miles Charge	Golden Miles	Undetermined

Resolving the Circular Priority Issue

45. The above priority analysis is subject to a “circular priority” issue, namely, that (i) the Merk Charge has priority to the Vicano Lien, (ii) the 2017 Skymark Charge and the 2018 Skymark Charge have priority to the Merk Charge, and (iii) the Vicano Lien has priority to the 2017 Skymark Charge and the 2018 Skymark Charge. Accordingly, based on the application of the law to each bi-lateral priority contest, no charge has first priority over the others.

46. On the facts of the present case, the Receiver believes that the foregoing chart reflects the appropriate resolution of this circular priority issue, because:

- (a) pursuant to the First Postponement and the Second Postponement, Merk agreed to be subordinate to the 2017 Skymark Charge and the 2018 Skymark Charge in full;⁵²

⁵² The Receiver notes that the Orr Plaintiffs (defined below) dispute the enforceability of the two postponements. The Orr Holdback is intended to address this issue and does not prejudice the parties regarding the circular priority: whether or not the Orr Plaintiff’s challenge of the postponements as it relates to the Orr Plaintiffs is successful, Merk is still subordinate to Skymark.

- (b) there are insufficient Real Property Proceeds to fund the 2017 Skymark Charge and the 2018 Skymark Charge in full, even without accounting for a \$1,659,413 priority payment to Vicano, meaning that even without the Vicano Lien, Merk would receive no distributions in these proceedings;
- (c) there are sufficient Real Property Proceeds to fund the Merk Charge and the Vicano Lien priority claim in full, meaning that Vicano would be paid in full on its priority claim regardless of the relative priorities of the Merk Charge, on the one hand, and the 2017 Skymark Charge and 2018 Skymark Charge, on the other hand;
- (d) it would be a windfall for Merk if Merk were to receive any payments before the 2017 Skymark Charge and 2018 Skymark charge are paid in full; and
- (e) it would be unfairly prejudicial to the beneficiaries of the 2017 Skymark Charge and 2018 Skymark Charge if their distributions were reduced by the amount of the Merk Charge simply because the Merk Charge has priority to the Vicano Lien priority claim.

47. The Ontario Court of Appeal provides guidance which aligns with the above priority waterfall analysis, and instructs the Court to review the agreements entered into by the parties subject to the circular priority issue.⁵³ The priority dynamic between two parties, such as in the case of the Vicano Lien and 2017 Skymark Charge, does not automatically result in the claim lower in priority (e.g., the 2017 Skymark Charge) “going to the bottom of the queue” vis-à-vis a

⁵³ [C.I.F. Furniture Ltd., Re, 2011 ONCA 34, para. 38.](#)

third-party (e.g., Merk).⁵⁴ This Court has confirmed that a third-party creditor should not be “burdened nor benefited” by the priority dynamic between two other parties and thus receive a “windfall” unless such priority relationship specifically contemplates such result.⁵⁵

48. There is no evidence of Skymark intending to subordinate the 2017 Skymark Charge or 2018 Skymark to Merk, but rather evidence to the contrary pursuant to the First Postponement and Second Postponement. The Receiver’s proposed resolution to the circular priority issues (a) avoids a windfall for Merk; (b) avoids unfair prejudice to the beneficiaries of the 2017 Skymark Charge or 2018 Skymark Charge; and (c) is economically neutral to Vicano.

Interim Distribution to Vicano, Skymark, and KLN

49. As previously stated above, orders authorizing a receiver to make an interim distribution to stakeholders are commonly granted in insolvency proceedings, and the Court reviews any stakeholder prejudice, validity and enforceability of the relevant security, interest savings, and liquidity of the debtor after making the distribution as considerations in determining whether to exercise its discretion to make such an order.⁵⁶

50. The proposed interim distribution of the Mahal VC Proceeds to Vicano, Skymark, and KLN (which has an interest in the 2017 Skymark Charge) does not give rise to any prejudice pursuant to the aforementioned priority analysis conducted by the Receiver.

⁵⁴ *Ibid.*

⁵⁵ *C.I.F. Furniture Ltd., Re*, 2010 ONSC 505, paras 50-1 affirmed by *C.I.F. Furniture Ltd., Re*, 2011 ONCA 34.

⁵⁶ See *Re Abitibowater Inc.*, 2009 QCCS 6461, at para. 75; the *Ancillary Relief Order of Justice Steele*, dated July 19, 2022, in the Receivership Proceeding of 2244039 Ontario Inc. and 1526400 Ontario Inc; the *Approval and Vesting Order of Justice Cavanagh*, dated December 20, 2022 in the Receivership Proceeding of Brant Instore Corporation; and *the Interim Distribution Order of Justice Penny*, dated March 3, 2022 in the Receivership Proceeding of 33 Yorkville residences and 33 Yorkville Residences Limited Partnership.

51. The factors contemplated in *AbitibiBowater, (Re)* are satisfied in this case. The Receiver has reviewed each of the Vicano Lien, the 2017 Skymark Charge, and associated transfers, and has confirmed that each registered interest is valid, enforceable, and properly perfected, as applicable.⁵⁷ In respect to the Vicano Lien, the Receiver confirmed the quantum of such lien based on the advice of Altus, an expert construction cost consultant that reviewed all relevant invoices and assessed the reasonableness of Vicano Lien.⁵⁸ The Receiver further notes that the proposed interim distribution will inevitably result in interest savings for the estate and will not give rise to debtor liquidity concerns.

Holdback of Mahal VC Proceeds

52. As discussed above, the Receiver holds approximately \$14.7 million of Mahal VC Proceeds. It is reasonable in the circumstances for the Receiver to hold back the following amounts from the Mahal VC Proceeds:

- (a) \$600,000 as a reserve for the professional costs to address the unresolved claims and to complete the administration of the Receivership Proceedings (the “**Mahal VC Cost Reserve**”);
- (b) \$3,650,000, referred to as the “**Orr Holdback**”, to be held back from the proposed interim distribution to Skymark (but not KLN),⁵⁹ pending resolution of the trust claim made by 1989474 Ontario Inc. and 7539088 Canada Inc.; and

⁵⁷ Fifth Report at para 6.1(1)(b) and (d).

⁵⁸ Fifth Report at para 6.4.2.

⁵⁹ As discussed in the Fifth Report, the Receiver is proposing to take the Orr Holdback out of Skymark’s distribution only, as the underlying the trust claim that gives rises to the Orr Holdback is against Skymark (and Merk), but not KLN. In the Receiver’s view, because the proposed Skymark distribution is sufficiently large that the entire Orr Holdback can be taken out of it, it would be

- (c) \$1,500,000, referred to above as the “**Omit Tax Reserve**”, pending the resolution of the “omit” City of Bradford tax bills for 2020, 2021 and 2022.⁶⁰

53. After accounting for the Mahal VC Cost Reserve, Orr Holdback, and the Omit Tax Reserve, there remains approximately \$9,204,136 of Mahal VC Proceeds to be distributed in accordance with aforementioned priority waterfall analysis. Based on this available distribution amount, the quantum of the creditors’ claims, and the priority of those claims, distributions are only possible and proposed in respect of the Vicano Lien and 2017 Skymark Charge.

54. Accordingly, the Receiver recommends that the Court issue an order authorizing the Receiver to make distributions to the following parties in the following amounts, from the Mahal VC Proceeds:

Creditor	Amount of Interim Distribution
Vicano	\$1,659,413, being 10% of Vicano’s accepted claim
Skymark	\$5,097,556 on account of the 2017 Skymark Charge, being 78.14% of the Mahal VC Proceeds, less Vicano’s distribution, the Orr Holdback, the Mahal VC Cost Reserve and the Omit Tax Reserve
KLN	\$2,447,166 on account of the 2017 Skymark Charge, being 21.86% of the Mahal VC Proceeds less Vicano’s distribution, the Mahal VC Cost Reserve and the Omit Tax Reserve

C. APPROVAL OF FEES, ACTIVITIES AND R&D

55. In *Target Canada*, the Court noted that there are good policy and practical reasons to grant the approval of Monitor’s reports and activities, including (a) allowing the Monitor to bring its

unduly prejudicial to KLN (who is not a party to the trust claim) for its distribution to be reduced or deferred as a result of the claims against Skymark.

⁶⁰ Fifth Report at para 10.0(2).

activities before the Court; (b) allowing an opportunity for stakeholders' concerns to be addressed; (c) enabling the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners; (d) providing protection for the Monitor not otherwise provided by the *Companies' Creditors Arrangement Act*; and (e) protecting creditors from delay that may be caused by re-litigation of steps or potential indemnity claims by the Monitor.⁶¹

56. Recently, the principles set out in *Target Canada* were reaffirmed by Chief Justice Morawetz in *Laurentian University*.⁶²

57. These comments and the policy considerations identified by the Court apply with equal force to Receivership Proceedings, and motions seeking approval of a receiver's report and activities described therein.⁶³

58. This Court has jurisdiction to review and approve the activities of a receiver. If the receiver has met the objective test of demonstrating that it has acted reasonably, prudently and not arbitrarily, the court may approve the activities set out in its report.⁶⁴

59. The Receiver respectfully submits that it has met the aforementioned objective test in respect of the fees of the Receiver and Blakes, the activities contained in the Fifth Report, and the R&D.

⁶¹ [Re Target Canada Co., 2015 ONSC 7574 \[Target Canada Co.\]](#) at paras 2, 22-23.

⁶² [Re Laurentian University of Sudbury, 2022 ONSC 2927](#) at paras 13-14; [Target Canada Co.](#) at paras 2, 22-23.

⁶³ [Re Hanfeng Evergreen Inc., 2017 ONSC 7161](#) at para 15.

⁶⁴ [Lang Michener v American Bullion Minerals Ltd., 2005 BCSC 684](#) at para 21.

PART V - CONCLUSION

60. For the reasons set out above, the Receiver respectfully requests that this Court grant the relief sought.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of August, 2023.



Chris Burr
Lawyer for the Receiver

SCHEDULE “A”

LIST OF AUTHORITIES

<u>Case</u>	
1.	<u>Re Abitibiwater Inc., 2009 QCCS 6461</u>
2.	<u>Receivership Proceeding of 2244039 Ontario Inc. (Ancillary Relief Order of Justice Steele, dated July 19, 2022)</u>
3.	<u>Receivership Proceeding of Brant Instore Corporation (Approval and Vesting Order of Justice Cavanagh, dated December 20, 2022)</u>
4.	<u>Receivership Proceeding of 33 Yorkville residences and 33 Yorkville Residences Limited Partnership (Interim Distribution Order of Justice Penny, dated March 3, 2022)</u>
5.	<u>Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc, 2019 ONCA 508</u>
6.	<u>Re SemCanada Crude Company (Companies' Creditors Arrangement Act), 2009 ABQB 90</u>
7.	<u>Ontario Wealth Management Corp. v. Sica Masonry, 2014 ONCA 500</u>
8.	<u>Royal Bank v. Lawton Developments Inc., 1994 CanLII 7215 (ON SC) as varied by Royal Bank of Canada v. Lawton Developments Inc., 1996 CanLII 10246 (ON CA)</u>
9.	<u>C.I.F. Furniture Ltd., Re, 2011 ONCA 34</u>
10.	<u>C.I.F. Furniture Ltd., Re, 2010 ONSC 505</u>
11.	<u>Re Target Canada Co., 2015 ONSC 7574</u>
12.	<u>Re Laurentian University of Sudbury, 2022 ONSC 2927</u>
13.	<u>Re Hanfeng Evergreen Inc., 2017 ONSC 7161</u>
14.	<u>Lang Michener v American Bullion Minerals Ltd., 2005 BCSC 684</u>

SCHEDULE “B”

TEXT OF RELEVANT STATUTES AND REGULATIONS

Land Titles Act, R.S.O. 1990, c. L.5

Registration

Time of receipt to be noted

78 (1) The day, hour and minute of the receipt of each instrument presented for registration and of each copy of a writ or lien received under section 136 shall be noted thereon by the officer or clerk receiving the instrument or copy. R.S.O. 1990, c. L.5, s. 78 (1).

Order of registration

(2) Subject to the regulations, an instrument received for registration shall be registered in the order of time in which it is so received, unless before registration is completed it is withdrawn or the land registrar decides that it contains a material error, omission or deficiency or that there is evidence lacking that the land registrar considers requisite or declines registration for any other reason, and notifies the parties or their solicitors accordingly within twenty-one days after being so received and allows a period of time not less than seven and not more than thirty days from the date of such notification for correction of the error, omission or deficiency or for furnishing evidence and, when the error, omission or deficiency is corrected or evidence furnished within the time allowed, the instrument has priority as if it had been correct in the first instance, but, if the error, omission or deficiency is not corrected or if evidence is not furnished within the time allowed or if the person desiring registration fails to appeal successfully from the decision, the land registrar may proceed with other registrations affecting the land as if the instrument had not been presented for registration, and the land registrar shall be deemed not to be affected with notice of the contents of the instrument. R.S.O. 1990, c. L.5, s. 78 (2); 1993, c. 27, Sched.

When registration complete

(3) Registration of an instrument is complete when the instrument and its entry in the proper register are certified in the prescribed manner by the land registrar, deputy or assistant deputy land registrar, and the time of receipt of the instrument shall be deemed to be the time of its registration. R.S.O. 1990, c. L.5, s. 78 (3).

Effect of registration

(4) When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register. R.S.O. 1990, c. L.5, s. 78 (4).

Exception

(4.1) Subsection (4) does not apply to a fraudulent instrument that is registered on or after October 19, 2006. 2006, c. 34, s. 15 (10).

Non-fraudulent instruments

(4.2) Nothing in subsection (4.1) invalidates the effect of a registered instrument that is not a fraudulent instrument described in that subsection, including instruments registered subsequent to such a fraudulent instrument. 2006, c. 34, s. 15 (10).

Priorities

(5) Subject to any entry to the contrary in the register and subject to this Act, instruments registered in respect of or affecting the same estate or interest in the same parcel of registered land as between themselves rank according to the order in which they are entered in the register and not according to the order in which they were created, and, despite any express, implied or constructive notice, are entitled to priority according to the time of registration. R.S.O. 1990, c. L.5, s. 78 (5).

Postponement of registered rights

(6) Upon registration of an instrument in the prescribed form, the rights of priority acquired by registration may be postponed to rights acquired or claimed under another registered instrument. R.S.O. 1990, c. L.5, s. 78 (6).

Construction Act, R.S.O. 1990, c. C.30

**PART IV
HOLDBACKS**

Holdbacks

Basic holdback

22 (1) Each payer upon a contract or subcontract under which a lien may arise shall retain a holdback equal to 10 per cent of the price of the services or materials as they are actually supplied under the contract or subcontract until all liens that may be claimed against the holdback have expired or been satisfied, discharged or otherwise provided for under this Act. R.S.O. 1990, c. C.30, s. 22 (1); 2017, c. 24, s. 17 (1), 66.

Separate holdback for finishing work

(2) Where the contract has been certified or declared to be substantially performed but services or materials remain to be supplied to complete the contract, the payer upon the contract, or a subcontract, under which a lien may arise shall retain, from the date certified or declared to be the date of substantial performance of the contract, a separate holdback equal to 10 per cent of the price of the remaining services or materials as they are actually supplied under the contract or subcontract, until all liens that may be claimed against the holdback have expired or been satisfied, discharged or otherwise provided for under this Act. R.S.O. 1990, c. C.30, s. 22 (2); 2017, c. 24, s. 17 (2), 66.

When obligation to retain applies

(3) The obligation to retain the holdbacks under subsections (1) and (2) applies irrespective of whether the contract or subcontract provides for partial payments or payment on completion. R.S.O. 1990, c. C.30, s. 22 (3).

Permissible forms of holdback

(4) Some or all of any holdbacks may, instead of being retained in the form of funds, be retained in one or more of the following forms:

1. A letter of credit in the prescribed form.
2. A demand-worded holdback repayment bond in the prescribed form.
3. Any other form that may be prescribed. 2017, c. 24, s. 17 (3).

Priority over mortgages, etc.

78 (1) Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises. R.S.O. 1990, c. C.30, s. 78 (1); 2017, c. 24, s. 70.

Building mortgage

(2) Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered. R.S.O. 1990, c. C.30, s. 78 (2).

Prior mortgages, prior advances

(3) Subject to subsection (2), and without limiting the effect of subsection (4), all conveyances, mortgages or other agreements affecting the owner's interest in the premises that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent of the lesser of,

(a) the actual value of the premises at the time when the first lien arose; and

(b) the total of all amounts that prior to that time were,

(i) advanced in the case of a mortgage, and

(ii) advanced or secured in the case of a conveyance or other agreement. R.S.O. 1990, c. C.30, s. 78 (3); 2017, c. 24, s. 70, 71.

Prior mortgages, subsequent advances

(4) Subject to subsection (2), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that was registered prior to the time when the first lien arose in respect of an improvement, has priority, in addition to the priority to which it is entitled under subsection (3), over the liens arising from the improvement, to the extent of any advance made in respect of that conveyance, mortgage or other agreement after the time when the first lien arose, unless,

(a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or

(b) prior to the time when the advance was made, the person making the advance had received written notice of a lien. R.S.O. 1990, c. C.30, s. 78 (4); 2017, c. 24, s. 53 (1), 70.

Special priority against subsequent mortgages

(5) Where a mortgage affecting the owner's interest in the premises is registered after the time when the first lien arose in respect of an improvement, the liens arising from the improvement have priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV. R.S.O. 1990, c. C.30, s. 78 (5); 2017, c. 24, s. 70.

General priority against subsequent mortgages

(6) Subject to subsections (2) and (5), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that is registered after the time when the first lien arose in respect to the improvement, has priority over the liens arising from the improvement to the extent of any advance made in respect of that conveyance, mortgage or other agreement, unless,

(a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or

(b) prior to the time when the advance was made, the person making the advance had received written notice of a lien. R.S.O. 1990, c. C.30, s. 78 (6); 2017, c. 24, s. 53 (1), 70.

Advances to trustee under Part IX

(7) Despite anything in this Act, where an amount is advanced to a trustee appointed under Part IX as a result of the exercise of any powers conferred upon the trustee under that Part,

(a) the interest in the premises acquired by the person making the advance takes priority, to the extent of the advance, over every lien existing at the date of the trustee's appointment; and

(b) the amount received is not subject to any lien existing at the date of the trustee's appointment. R.S.O. 1990, c. C.30, s. 78 (7); 2017, c. 24, s. 70.

Where postponement

(8) Despite subsections (4) and (6), where a preserved or perfected lien is postponed in favour of the interest of some other person in the premises, that person shall enjoy priority in accordance with the postponement over,

(a) the postponed lien; and

(b) where an advance is made, any unperfected lien in respect of which no written notice has been received by the person in whose favour the postponement is made at the time of the advance,

but nothing in this subsection affects the priority of the liens under subsections (2) and (5). R.S.O. 1990, c. C.30, s. 78 (8); 2017, c. 24, s. 70.

Saving

(9) Subsections (2) and (5) do not apply in respect of a mortgage that was registered prior to the 2nd day of April, 1983. R.S.O. 1990, c. C.30, s. 78 (9).

Financial guarantee bond

(10) A purchaser who takes title from a mortgagee takes title to the premises free of the priority of the liens created by subsections (2) and (5) where,

(a) a bond of an insurer licensed under the *Insurance Act* to write surety and fidelity insurance; or

(b) a letter of credit or a guarantee from a bank listed in Schedule I or II to the *Bank Act* (Canada), in the prescribed form is registered on the title to the premises, and, upon registration, the security of the bond, letter of credit or the guarantee takes the place of the priority created by those subsections, and persons who have proved liens have a right of action against the surety on the bond or guarantee or the issuer of the letter of credit. R.S.O. 1990, c. C.30, s. 78 (10); 1997, c. 19, s. 30; 2017, c. 24, s. 53 (2), 70.

Home buyer's mortgage

(11) Subsections (2) and (5) do not apply to a mortgage given or assumed by a home buyer. R.S.O. 1990, c. C.30, s. 78 (11).

Bankruptcy and Insolvency Act R.S.C., 1985, c. B-3, s. 243(1)(c)

PART XI

Secured Creditors and Receivers

Court may appoint receiver

- **243 (1)** Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
 - **(a)** take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
 - **(b)** exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
 - **(c)** take any other action that the court considers advisable.

SKYMARK FINANCE CORPORATION
Applicant

- and -

MAHAL VENTURE CAPITAL INC., et al.
Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding Commenced at Toronto

FACTUM OF THE RECEIVER & TRUSTEE
(Distribution and Fee & Activity Approval)

Returnable August 23, 2023

BLAKE, CASSELS & GRAYDON LLP

Barristers and Solicitors

199 Bay Street

Suite 4000, Commerce Court West

Toronto, Ontario M5L 1A9

Chris Burr, LSO #55172H

Tel: 416-863-3261

Email: chris.burr@blakes.com

Daniel Loberto, LSO #79632Q

Tel: 416-863-2937

Email: daniel.loberto@blakes.com

Lawyers for the Receiver and Trustee